SEEK LAI NEO & ANOR.

v.

CHENG CHUAN DEVELOPMENT SDN. BHD. & 2 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[ORIGINATING SUMMONS NO.R8-24-05-91]
15 JUNE 1994

COMPANY LAW: Company effecting disposition of property after winding-up - Whether transaction void - Whether property to revert to Official Assignee - Power of Court to validate void transaction - Section 223 Companies Act 1965 - Whether to be invoked.

CONTRACT: Sale and purchase agreement - Default by purchasers - Repudiation of agreement by vendor - Whether justified - Whether purchasers entitled to specific performance - Whether purchasers entitled to damages.

LAND LAW: Sale and purchase of land - Vendor repudiating agreement and sold property to other purchasers - Title to property - Whether passed to subsequent purchasers - Whether title of subsequent purchasers indefeasible - Whether subsequent purchasers bona fide purchasers for value - National Land Code s. 340(1)&(2).

In January 1984 the plaintiffs entered into an agreement with the 1st defendant, a housing developer, to purchase a shophouse (the property) for RM300,000 to be constructed by the latter. Pursuant to that the plaintiffs paid the 1st defendant RM160,000 and agreed to pay the balance in instalments. The plaintiffs defaulted in the instalments and by end of May 1984 the outstanding arrears stood at RM60,000. The 1st defendant then gave the plaintiffs notice to pay up, and on non-compliance thereof, had the agreement repudiated on 1 August 1984.

In November 1984, the 1st defendant executed an agreement with the 2nd and 3rd defendants and sold the property to the latter. In 1988 the 1st defendant was compulsorily wound up at the instance of its creditor. That notwithstanding, the 1st defendant went on to execute the instrument of transfer in respect of the aforesaid sale and on 19 December 1990 had the property effectively transferred to the 2nd and 3rd defendants. This transfer was executed without the knowledge of the Official Assignee.

The plaintiff sued the 1st defendant for specific performance or alternatively for damages for breach of agreement, alleging, inter alia, that the transfer of the property herein was null and void. Before the learned Judge the primary issues that arose were:

(1) Whether the disposition of the property by the 1st defendant to the 2nd and 3rd defendants was void, with the result that no title had passed to the latter in respect of the property.

(2) Whether the 2nd and 3rd defendants were *bona fide* purchasers for value and had therefore retained an indefeasible title to the property.

(3) In any case, whether the Court ought to cancel the transfer and order that the property be reverted to the Official Assignee.

Held:

[1] The plaintiffs have only themselves to blame for their breach and they cannot fault the 1st defendant for annulling the sale of the property and terminating the agreement. It is clear that, when the second agreement was executed, no binding agreement was existing between the plaintiffs and the 1st defendant over the sale and purchase of the property. There was thus no legal impediment standing in the way of the 1st defendant to prevent them from selling the property to the 2nd and 3rd defendants. The plaintiffs therefore are not entitled to the reliefs claimed.

[2] The argument that the 1st defendant, having been wound up in 1988, had no authority to thereafter transfer the property to the 2nd and 3rd defendants, resulting in the transfer of the property to the latter in 1990 being void under s. 223 of the Companies Act, which in turn rendered the instrument effecting such disposition equally void under s. 340 (2)(b) of the National Land Code (NLC), is only sustainable as against the 1st defendant. The argument cannot apply to the 2nd and 3rd defendants, particularly so when there is no allegation of misrepresentation or fraud against them or that they had acted in concert with the 1st defendant to effect the disposition while aware that the latter had no authority to do so.

[3] The 2nd and 3rd defendants, in the circumstances of this case, could only be purchasers for value. And by virtue of the transfer of the property to them, they became the registered proprietors of the same, and under s. 340(1) NLC, their title is indefeasible. On the evidence the plaintiffs have failed to establish that the said title is defeasible under s. 340(2)(b) by reason that the registration of the title was effected by a void registration.

[4] Whatever remedies the plaintiffs possess must come from their contractual relationship arising from the first agreement. The plaintiffs, in this respect, have no cause of action against the 2nd and 3rd defendants. The plaintiffs cannot sue the 2nd and 3rd defendants on that agreement as the 2nd and 3rd defendants were not parties to the agreement. The plaintiffs cannot sue on the second agreement either as they themselves were strangers vis-a-vis that agreement.

[5] By s. 223 of the Companies Act the Court is empowered to validate a transaction that would otherwise be void. On the peculiar facts of this case, the Court ought not to revert the dispute over title to the Official Assignee as it would only prolong the determination of the dispute altogether. In addition, it would also cause injustice to the 2nd and 3rd defendants, they being the bonafide purchasers for value having an indefeasible title to the property. In the premises, s. 223 of the Companies Act is hereby invoked and the disposition of the property is validated so as to confirm that the title on the property has passed to the 2nd and 3rd defendants.

[Application dismissed].

Legislation referred to:
Companies Act, 1965, s. 223
National Land Code, 1965 s. 340 (1) & (2)(b)

For the plaintiff - Low Hop Bing; M/s. Low Hop Bing & Associates
For the 1st defendant - Noreen Badaruddin, Federal Counsel
For the 2nd and 3rd defendants - Harpal Singh, M/s. A.J. Ariffin Chong & Harpal

JUDGMENT

Siti Norma Yaakob J:

In these proceedings, the plaintiffs, a mother and son, seek principally to impeach the 2nd and 3rd defendants' title to a piece of property held under Grant No.10748 MLO 6445 in the Mukim of Plentong, District of Johor Bahru in the State of Johor (the property), and other consequential reliefs. To appreciate the true nature of the plaintiffs' claims, I need to go back to 1984 and trace the events affecting the parties to these proceedings.

On 7 January 1984, the plaintiffs entered into a sale and purchase agreement (the first agreement) with the 1st defendant, a housing developer, to purchase a piece of property, together with a 4 storey shophouse to be constructed on the property, at the agreed price of RM300,000. The purchase price was to be paid by the plaintiffs in instalments in the manner prescribed in the third schedule of the first agreement.

The plaintiffs paid RM160,000 to the 1st defendant and the balance of the purchase price was to be settled by a bank loan to be obtained by the plaintiffs from Bank Bumiputra Malaysia Berhad (BBMB), Kota Tinggi, Johor. Approval for a fixed loan facility of RM140,000 was only notified by BBMB to the plaintiffs on 28 August 1994, by which time the plaintiffs had already fallen into arrears of 2 instalment due under the first agreement. The first breach occurred on 14 February 1984, when the plaintiffs failed to respond to the 1st defendant's demand dated 31 January 1984, to remit RM68,000 being the progress payment due for the works done at that stage, i.e. for the reinforced concrete frameworks, walls, doors and window frames. The 2nd breach occurred on 14 May, 1984, when again the plaintiffs failed to respond fully to the 1st defendant's demand dated 30 April, 1984, to remit another RM30,000 for the internal and external plastering. It was only on 22 May 1984, that the plaintiffs remitted RM38,000 but it was not sufficient to cover the arrears of instalments then due, as there was still a balance of RM60,000 still due and owing as at 22 May 1984. By letter dated 17 July 1984, when the plaintiffs failed to pay the arrears, the 1st defendant gave them 14 days within which to pay the RM60,000 together with interests at the rate of 10% per annum for the delayed payment under clause 8 of the first agreement, failing which the 1st defendant would treat the agreement as being repudiated by the plaintiffs pursuant to clause 9(2). The agreement was duly treated by the 1st defendant as being repudiated by the plaintiffs when the latter failed to remit the arrears of instalment due by 1 August, 1984.

Three and a half months later, on 14 November, 1984, the 1st defendant entered into another sale and purchase agreement (the second agreement), this time with the 2nd and 3rd defendants, a father and son, for the sale of the same property at the same purchase price of RM300,000

When the plaintiffs became aware of the second agreement, they sued the 1st defendant in Johor Bahru Civil Suit No.308/85 (the JB suit) on 24 April 1985, seeking specific performance of the first agreement or, alternatively, damages for breach. The 2nd and 3rd defendants were not cited as parties to the JB suit but nonetheless the plaintiffs obtained an ex parte injunction in that suit, restraining them, their agents or servants, from entering into possession of the property.

Following this, the plaintiffs obtained a default order against the 1st defendant that the first agreement be specifically enforced by it. That was on 1 February 1989, well after the 1st defendant had already been compulsorily wound up by an Order of Court dated 17 August 1988, at the instance of a creditor.

On 19 December 1990, 2 years and 4 months after the 1st defendant was wound up, and without the knowledge of the Official Assignee, the property was transferred into the names of the 2nd and 3rd defendants and the plaintiffs now allege that the transfer is null and void.

The Official Assignee confirms that the transfer was made without his knowledge and to that extent is void under s. 223 of the Companies Act, 1965 and attempts to locate the officers of the 1st defendant have proved futile. Todate officers of the 1st defendant have failed to file the Statement of Affairs of the 1st defendant with the Official Assignee within the statutory period as prescribed for under s. 234 of the Companies Act, 1965. The Official Assignee has also confirmed that the plaintiffs have paid the balance of the purchase price of the property to him on 10 May 1994, and to that extent, asks that the property be reverted to him.

The 2nd and 3rd defendants claim that they are bona fide purchasers for value without notice of the plaintiffs' prior right to the property, a contention that is strongly opposed to by the plaintiffs on the grounds that the 2nd and 3rd defendants

(1) have failed to provide the necessary evidence that they had paid for the property.

(2) have not prior to the registration of the property into their names, obtained vacant possession of the property.

(3) have obtained title to the property by virtue of a void instrument.

It is true that there is no documentary evidence in the form of payments or receipts to show that the 2nd and 3rd defendants had settled the purchase price of the property in full with the 1st defendant. But there is the instrument of transfer, form 14A, a certified copy of which has been exhibited. In it the 1st defendant has acknowledged receipt of RM300,000 being the consideration for the transfer and this amount must represent the purchase price paid for by the 2nd and 3rd defendants to the 1st defendant. It is true there is no evidence when such payment was made but I consider that this lack of evidence does not render the transfer form in any way void. For the same reason, I do not consider that the reluctance on the part of the 2nd and 3rd defendants to obtain vacant possession of the property is conclusive that the transfer form is void.

Perhaps the only objection that merits consideration is the plaintiffs' contention that the 2nd and 3rd defendants' title to the property is defeasible by virtue of s. 340(2)(b) of the National Land Code, 1965 in that the registration of the title was obtained by means of an insufficient or void instrument.

The certified copy of form 14A that was registered with the Land Office, Johor, discloses a number of undisputed facts which are apparent on the face of the form. It was signed by the 1st defendant on 15 March 1985. It was deposited with the Land Office on 6th November, 1990, and referred to the Valuation Office on 14 November 1990, for a valuation to be done on the property for the purpose of fixing

the stamp duty payable. On 12 December 1990, the Land Office received the return of the transfer form together with the valuation of the property and the amount of stamp duty payable. The stamp duty was paid on 18 December, 1990, and the transfer was effected on 19 December 1990, thereby passing the title of the property to the 2nd and 3rd defendants.

From these undisputed facts, the plaintiffs maintain that on 6 November 1990, when the transfer form was deposited with the Land Office, and on 19 December 1990, when the registration was effected, the 1st defendant had no authority to effect any disposition of the property, as at that point of time, it had already been wound up 2 years earlier and the Official Assignee had not given his consent to such a disposition. As such, the disposition is void under s. 223 of the Companies Act, 1965 and this, in turn, renders the instrument effecting such a disposition void under s. 340(2) (b) of the National Land Code. This may well be so as against the 1st defendant but I consider the same cannot be said of the 2nd and 3rd defendants, particularly when there is no allegation of any fraud or misrepresentation against them or that they had acted in concert with the 1st defendant to effect a disposition when they were fully aware that the 1st defendant had no authority to do so.

There is also no evidence to show that the 2nd and 3rd defendants were aware of the existence of the first agreement when they entered into the second agreement with the 1st defendant. In this respect, the plaintiff claim that the second agreement should not have been executed by them with the 1st defendant on 14 November 1984, as at that point of time, the first agreement was still valid and subsisting.

I do not agree with this contention as the contemporaneous documents speak otherwise. The 1st defendant's letters of demand dated 31 January 1984, 30 April 1984, and 17 July 1984, all point to the fact that the plaintiffs had failed to meet their obligations to remit the instalment payments due under the first agreement.

BBMB did not release the loan to the 1st defendant as payment for the balance of the purchase price even though it had approved a loan facility of RM140,000 to the plaintiffs on 28 August 1984. This is borne out by the fact that the plaintiffs only settled the balance of the purchase price by paying the sum of RM140,000 to the Official Assignee on 10 May 1994, 7 days before the hearing of these proceedings before me.

As the hearing of this originating summons is confined to affidavit evidence and since the contemporaneous documents establish that the plaintiffs had delayed paying the balance of the purchase price, they have only themselves to blame for their own breach and they cannot find fault with the 1st defendant's action in annulling the sale of the property and terminating the first agreement under clause 9(2). From the documentary evidence, it is clear that by 14 November 1984, there was no binding agreement existing between the plaintiffs and the 1st defendant over the sale and purchase of the property and there was no other legal impediment standing in the way of the 1st defendant when they decided to sell the same property to the 2nd and 3rd defendants.

As I have stated earlier, the plaintiffs have paid the balance of the purchase price to the Official Assignee only a week before the hearing of this originating summons. The only reason why this was done at this late stage is to bolster the

plaintiffs' claim that they are entitled to have the first agreement specifically performed by the 2nd and 3rd defendants as well. This contention is misconceived as the 2nd and 3rd defendants were not parties to the first agreement. The plaintiffs are all too aware of this as they only sued the 1st defendant in the JB suit when they had asked for the first agreement to be specifically performed and a default order to that effect was obtained by the plaintiffs against the 1st defendant on 1 February 1989. On hindsight that order is now suspect as at 1 February 1989, the 1st defendant had already been wound up and any proceedings taken against the 1st defendant in liquidation must be with the consent of the Official Assignee. In this respect, the Official Assignee was not aware of such proceedings. In any event, as at 1 February 1989, the plaintiffs have not settled the balance of the purchase price and this is another reason why I consider the order for specific performance against the 1st defendant to be questionable.

On the peculiar facts of this case, the 2nd and 3rd defendants are the registered proprietors of the land and under s. 340(1) of the National Land Code 1965, their title is indefeasible. For reasons that I have already given, the plaintiffs have failed to establish that the 2nd and 3rd defendants' title is defeasible under s. 340(2)(b) by reason that the registration of the title was effected by a void instrument. Under these circumstances, what possible remedy do the plaintiffs have against either the 1st or the 2nd and 3rd defendants? As against the 1st defendant, whatever remedies they possess must come from their contractual relationship arising from the first agreement. I have already stated my reservations why the equitable remedy of specific performance is inappropriate based on the facts of this case.

As for the plaintiffs' claim for damages against the 1st defendant, this will depend on whether the 1st defendant had committed a breach of the first agreement when they terminated the agreement. In this respect, I have already considered the termination to be justified as the breach was not committed by the 1st defendant but by the plaintiffs.

As against the 2nd and 3rd defendants, the plaintiffs have no cause of action against them at all. The plaintiffs cannot sue them on the first agreement as the 2nd and 3rd defendants were not parties to such an agreement. For that matter, the plaintiffs cannot sue them on the second agreement either as they, the plaintiffs, were strangers to the second agreement. Their only common link is the 1st defendant and since the registration of the title was effected after the 1st defendant had already been wound up and under s. 223 of the Companies Act such a disposition is void, the issue is whether this Court can cancel the transfer and order that the property be reverted to the Official Assignee so that he can settle the dispute over the title of the property.

Section 223 of the Companies Act, 1965 states that

> any disposition of the property of the Company ...made after the commencement of the winding up by the Court shall, unless the Court otherwise orders, be void.

The phrase "unless the Court otherwise orders" does empower me to validate a transaction that would otherwise be void. On the peculiar facts of this case, I am most reluctant to revert the dispute over title to the Official Assignee as, firstly, by virtue of s. 340(1) of the National Land Code, the 2nd and 3rd defendants have

an indefeasible title to the property and, secondly, reverting the matter to the Official Assignee will unnecessarily prolong the determination of this dispute altogether and would cause injustice to the 2nd and 3rd defendants, who are after all the *bona fide* purchasers for value. Bearing in mind that I have the power to validate a void transaction under s. 223 of the Companies Act and since the facts of this case warrant it, I make the following orders:

(1) That the disposition of the property by the 1st defendant on 19 December 1990, is hereby validated so as to confirm that the title on the property has passed to the 2nd and 3rd defendants.

(2) This originating summons is dismissed with costs.